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JOHN F. LUNDY

UNITED STATES DISTRICT COURT

CALIFORNIA NORTHERN DISTRICT (SAN FRANCISCO)

JOHN F. LUNDY	)	Case No.: 3:15-cv-05676-JST
)	
Plaintiff,	)	PLAINTIFF’S OPPOSITION TO SELENE
	)	FINANCE LP’S AND WILMINGTON
	)	SAVINGS FUND SOCIETY, FSB’S
	)	NOTICE OF MOTION AND MOTION TO
v.	)	EXPUNGE LIS PENDENS;
	)	MEMORANDUM OF POINTS AND
	)	AUTHORITIES IN
	)	SUPPORT THEREOF
SELENE FINANCE, LP; MTC FINANCIAL)	
d/b/a TRUSTEE CORPS; JPMORGAN)	
CHASE BANK, N.A.; BANK OF AMERICA,)	
N.A.; WILMINGTON SAVINGS FUND)	
SOCIETY, FSB d/b/a CHRISTIANA TRUST,	)	Date: March 10, 2016
as trustee for BCAT 2014-12TT and DOES 1-	)	Time: 2:00 p.m.
100 inclusive,	)	Dept.: Courtroom 9
)	
Defendants.)	
)	

TO THE COURT, DEFENDANTS, ATTORNEYS OF RECORD AND ALL
INTERESTED PARTIES:

Plaintiff JOHN F. LUNDY opposes Defendants' Motion to Expunge the Lis Pendens (now known as notice of pendency of action) that Plaintiff's filed in the Recorder's Office of Contra Costa County in connection with the above-entitled case. Plaintiff's Opposition is based on the

1 accompanying Memorandum of Points and Authorities, the Verified Complaint and the record of the
2 case.

3 **MEMORANDUM OF POINTS AND AUTHORITIES**

4 **I. FACTS**

5 The Complaint seeks to quiet title with regard to real property commonly known as 29
6 Bridgegate Drive, San Rafael, Contra Costa County, California 94903, APN 164-570-29. In
7 addition, the Complaint asserts causes of action, *inter alia*, for wrongful foreclosure, quiet title,
8 violation of Cal. Civil Code section 2923.55(a) and 55(b)(1)(B), violation of the Real Estate
9 Settlement Procedures Act, 12 U.S.C. section 2601, et seq., violation of Cal. Residential Mortgage
10 Lending Act, Cal. Fin. Code section 50505, violation of Cal. Civil Code section 2924.17 and
11 violation of Bus. & Profs. Code section 17200 et seq. Therefore, the action affects title to the real
12 property which is the subject of the Complaint.
13

14 **II. ARGUMENT**

15 A motion to expunge a lis pendens on the ground that the complaint does not contain a real
16 property claim “involves only a review of the adequacy of the pleading and normally should not
17 involve evidence from either side, other than possibly that which may be judicially noticeable”.
18 Cal. Code Civ. Proc. Section 405.30, Code comment, Para. 4. A “real property claim” is a cause of
19 action which, if meritorious, would affect title to, or the right to possession of, specific real
20 property. Cal. Code Civ. Proc. section 405.4. Defendants argue that the Court must expunge a lis
21 pendens “if the court finds that the claimant has not established by a preponderance of the evidence
22 the probable validity of the real property claim.” “Probable validity” means “that it is more likely
23 than not that the claimant will obtain a judgment against the defendant on the [real property]
24 claim.” Cal. Code Civ. Proc. Section 405.3.
25

26 Defendants’ motion to expunge the lis pendens is premature. Defendants have filed an
27 accompanying Motion to Dismiss the Complaint pursuant to Fed. R. Civ. P. 12(b)(6). A 12(b)(6)
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1 motion merely tests the sufficiency of the pleading. In reviewing the sufficiency of the complaint,
2 the issue is not whether the plaintiff will ultimately prevail, but whether the Plaintiff is entitled
3 to offer evidence to support the claims asserted. *See Scheuer v. Rhodes*, 416 U.S. 232, 236, 94
4 S. Ct. 1683, 40 L.Ed.2d 90 (1974). Inquiry into the adequacy of the evidence is improper. *Enesco*
5 *Corp. v. Price/Costco, Inc.*, 146 F. 3d 1083, 1085 (9th Cir. 1998). Thus, the “preponderance of
6 evidence” standard is not relevant to the review of a 12(b)(6) motion to dismiss.
7

8 Should the Court grant Defendants’ Motion to Expunge pursuant to CCP 405.3, then
9 Defendants should be required to post an undertaking in an amount sufficient to indemnify
10 Plaintiff for any and all damages Plaintiff could incur following expungement of the lis pendens.
11 CCP 405.33.

12 Moreover, due to the premature nature of the instant motion, it would be inappropriate for
13 this Court to award monetary damages by way of attorney’s fees to Defendants, even were
14 Defendants to prevail in same motion. Attorney’s fees are awarded, if at all, in connection with
15 such motions, typically when a particular Plaintiff has kept a Lis Pendens in place even after a
16 dismissal with prejudice of the underlying action, or in certain cases, when accompanied with a
17 properly plead motion for summary judgment. Here, the merits of Plaintiff’s complaint have not
18 even been subject to a full exchange of pleadings, and to grant attorney’s fees in the instant matter,
19 as a matter of public policy might dissuade similarly situated Plaintiffs in future from attaching a
20 Lis Pendens to a lawsuit such as this. This is quite troubling, in that apart from the fact that quiet
21 title has been plead, the entirety of the causes of action significantly effect the ability of a
22 hypothetical purchaser of the property to pass title. Plaintiff requests that this Court be mindful that
23 California law arguably requires a Lis Pendens to be filed in lawsuits such as these, not least to
24 inform the real estate purchasing public that this particular subject property is not one which if
25 purchased, would be reasonably alienable, particularly given the instant lawsuit, and the
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1 intersection of facts and law which gave rise to such suit. To be more precise, in relation to Cal.
2 Code of Civ. Proc. Section 405.20, Plaintiff is at a minimum encouraged to file a Lis Pendens in
3 connection with a lawsuit such as the instant one, for the public policy reasons raised above, which
4 can be distilled thusly: the public should be apprised of the clouding of title which a lawsuit such
5 as this creates, and the recording of such a Lis Pendens literally puts same public on notice that in
6 any commercial dealings with the current owner of same property, whether such dealings involve
7 purchasing the property or not, same dealings may be compromised or harmed by the fact of the
8 disputes underlying the Lis Pendens.
9

10 **CONCLUSION**

11 For the foregoing reasons, Defendants' Motion to Expunge Lis Pendens should be denied.
12

13
14 Respectfully submitted,

15 Dated: February 4, 2016

LAW OFFICES OF MARK W. LAPHAM

17 By: //s/Mark W. Lapham
18 Mark W. Lapham
19 Attorneys for Plaintiff
20 JOHN F. LUNDY
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